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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOHN BATIE on Habeas Corpus.	D057801 (San Diego County Super. Ct. No. HC16046)

Petition for writ of habeas corpus. Petition denied.

In this habeas proceeding, John Batie challenges the Governor's reversal of his grant of parole by the Board of Parole Hearings (Board). We have examined the record to determine if there is "some evidence" to support the Governor's finding that Batie poses an unreasonable risk of current dangerousness if released into the community, and conclude there is some evidence to support the Governor's decision. Accordingly, we deny Batie's request for relief

FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 1981, Batie shot and killed James Simmons. A jury convicted Batie of second degree murder. He was sentenced to 15 years to life in prison, with a two-year sentence for personal use of a firearm. The Board granted him parole in 2002,

2004, and 2007, but the decisions were reversed by the Governor. On February 4, 2009, the Board again granted him parole. On July 3, 2009, the Governor reversed the Board's decision. After an unsuccessful request for relief before the superior court, Batie challenges the Governor's decision in the current proceeding.[1]

Batie's Criminal History and the Commitment Offense

Batie's juvenile record includes battery at age 13, strong-arm robbery at age 14, attempted shoplifting and vehicular theft at age 16, and liquor store looting and car burglary at age 17. His adult record includes burglary and theft-related offenses in 1973, 1974, 1975, 1978, and 1981.

The commitment offense occurred at 9:30 p.m. on February 13, 1981, when Batie shot and killed Simmons in the parking lot of a liquor store.[2] Shortly before the shooting, Batie and Batie's friend (Manny Madrid) got into an argument with Simmons and Simmons's friend (Ellis Love) about money. The argument escalated into a fight between the men, who were throwing beer bottles at each other. A bottle thrown by Simmons hit Batie on the side of the head. Batie went behind the liquor store, retrieved a tire iron, and returned to the scene. There was no confrontation at that time. Batie left

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1 We issued an order to show cause based on Batie's habeas petition challenging the Governor's July 2009 decision. Batie requests that we expand our order to show cause to include an October 2010 decision by the Governor again reversing another parole grant by the Board. Because at the time of his request Batie had not sought relief before the superior court, we decline to expand our order to show cause.

2 The facts of the commitment offense are summarized in the probation report, our opinion affirming the conviction, prison evaluation reports, and the transcript of the Board hearing.

the scene again, and returned about five to 30 minutes later armed with a gun. Batie shot Simmons, who was unarmed, twice, and fled on foot. He was arrested a few hours later.

When Batie returned to the scene with the tire iron, he was stopped from attacking Simmons by others at the scene. As Batie was leaving the scene the second time, he stated that he would "get" Simmons and Simmons "better not be there when he got back." When Batie returned to the scene a short while later, Batie twice stated to Simmons, " 'All right, come out, James. I'm ready to fight now.' " The second time he spoke, Simmons stood up.[3] Simmons was standing between two cars. Batie approached Simmons and stated "something to the effect that he had something for Simmons." Batie pulled up his shirt with one hand, and with the other reached down in his pants and pulled out a gun. Batie shot Simmons twice, put the gun back in his waistband, and fled. Batie was 15 to 25 feet away from Simmons when he fired; Simmons was not armed; and Simmons had not made any movement towards Batie. The officer who checked the crime scene found no weapons.

Batie's Rehabilitation Efforts

Batie began his prison term in 1981. He received one disciplinary violation involving violent or threatening behavior, which occurred in 1987 and which was reduced to an administrative (less serious) violation. He received five other significant

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3 According to Batie, Simmons had been sitting on a curb.

disciplinary violations, with the last one occurring in 1994.[4] He also received 12 minor violations, with the last one occurring in 1997.

Batie had a significant substance abuse history, including use of marijuana and cocaine. He has regularly attended Narcotics Anonymous (NA) and/or Alcoholics Anonymous (AA). In 1990 he attended an addictions group, and in 1998 his cocaine and cannabis abuse were diagnosed as being in remission. From 1987 to 1989, he received one-to-one psychotherapy. He has completed various self-help programs, including Fatherhood and Anger Management, How to Become a Sober Father and Not Get Angry, Success Tools of the Masters, and Anger Management Course.

Batie received his GED in 1983 while incarcerated. Prior to his incarceration, he worked as a machinist and carpet layer. During his incarceration, he has participated in various occupational training programs, including small engine repair, machine shop, and optician. He has been working as a clerk since 2005. His work ratings have been above average or exceptional. He is active in his Muslim religion, including working as a chaplain's assistant and participating in music and educational programs.

Batie's Attitude Toward the Offense

After the offense, Batie maintained that he shot Simmons because he thought Simmons was going to stab him. He told the probation officer that he did not "shoot to kill Simmons"; he "shot down towards the ground and that Simmons was hit when he

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[4] The 1987 force and violence violation apparently involved Batie punching or pushing an inmate during an altercation. The other significant violations were for refusing to lock up, being in an unauthorized area, possession of instructions to manufacture PCP, and calling a correctional officer an obscene name.

fell"; he "wished this had never happened"; and his "main concern now is how much time he's got to do." The probation officer opined that Batie's claim of self-defense was "self-serving" and that Batie "acted out of anger after being hit by the beer bottle and ran off to obtain the gun, returning with what intention we are not sure of. He may or may not have intended to kill the victim, only he knows." The probation officer commented that during his interview, Batie "uttered not one word of sympathy for his victim or the victim's family."

During his years of imprisonment, Batie continued to maintain that he returned to the scene with the gun not with the intent to kill, but with the intent to scare the victim and/or the victim's companion, and that he shot the victim because he panicked when he saw the victim coming towards him with a knife. In 2007, Batie told psychologist Richard Starrett he had no intention of taking the victim's life, and he had the gun because he "was trying to scare the victim and it made him bigger than he was." At the 2009 parole hearing, Batie told the Board he did not expect "that was going to happen like that," and he panicked when he saw Simmons walking towards him with a knife in his hand. He stated he did not realize he had shot the gun twice, explaining that the first bullet hit Simmons in the groin area, and "then [Simmons] twisted and the other [bullet] went on the side."[5]

In 2007, psychologist Richard Starrett asked Batie why he was getting into trouble as a young person. Batie stated "he was attracted to the lifestyle. He said he was doing

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5 The Governor's 2008 decision states Simmons was shot in the thigh and back.

dumb and stupid things at the time. He grew up with people who did similar dumb and stupid things. His use of alcohol and drugs were contributing factors. He was making bad choices, was rebellious, and he did not care about himself or how much he hurt his mother." Batie stated that during the time period of the commitment offense he "was using alcohol and drugs and associating with criminal types . . . ." Batie "expressed remorse" and stated he felt "extremely sorry that the incident occurred." Batie told Dr. Starrett that on a daily basis he thinks about the loss of life and the effect on the family members; he takes responsibility for his behavior; he had come to realize that life was precious and that his crime affected both the victim's daughter and his daughter "dearly"; he was very sorry that it happened; and he wanted to make amends to society. He stated this conduct would not happen again because he was not going to get back into that lifestyle; he has more insight into life; he has purpose and goals; he is more family oriented and can communicate; and his religion helped him and taught him "peace."

At the 2009 parole hearing, Batie told the Board that he took Simmons's life and that Simmons did not deserve to die. He elaborated: "I know the circumstances could have been prevented. I know I could have stopped but I kept going and the way things was it happened so fast." He stated he had apologized to the victim's daughter, and he wished he could do something for her and for his daughter. He believed that if he not been drinking or using cocaine in the days before the shooting, he would not have done what he did, but would probably have run away. He was serious about staying away from drugs and alcohol; they would not be a part of his life because he knew that even the smallest amount "can take you right back spiraling down."

Psychological Assessment

The latest psychological assessment was performed by Dr. Starrett in 2007. Dr. Starrett stated that Batie acknowledged that his use of alcohol was a factor in his commission of the offense. Dr. Starrett opined that Batie had "totally embraced the substance abuse treatment program and its philosophy during his incarceration, and he continues to participate in treatment"; Batie was angry and overreacted to "this older male"; he realized in retrospect that he should have gotten out of the situation; and he has "apparently spent a considerable amount of time attempting to understand and gain insight into the causal factors of his criminal lifestyle."

Dr. Starrett used two empirical assessment tests to evaluate Batie's risk for future violence in the community. The Psychopathy Check List Revised (PCL-R) test measured Batie's level of psychopathy, a trait linked to episodes of repetitive aggression and criminality. Batie scored in the low range of psychopathy relative to the population of incarcerated males.

The second test for future violence, the History Clinical Risk Management 20 (HCR-20) test, includes a historical component, a clinical/insight component, and a risk management component. In the historical component, Batie tested in the high range for propensity for future violence based on "his age at the time of his first violent episode, his involvement in unstable relationships, his unstable employment, his history of substance abuse, having early maladjustments and prior supervision failures, having a diagnosis of Antisocial Personality Disorder, and to a lesser extent, his prior criminal history." In the clinical/insight component, he rated in the low range, based on findings that he did not

have a negative attitude, he did not have active mental health symptoms, he was not impulsive, he had responded well to treatment, and his insight and level of remorse appeared appropriate. In the risk management component, he again rated in the low range based on his ability to handle compliance, stress, and destabilizers while incarcerated. Dr. Starrett concluded that under the HCR-20 test, Batie's "overall propensity for violence is in the low-moderate to low range when compared to similar inmates."

Parole Plans

Batie is divorced and has one adult daughter, with whom he maintains "a warm and supportive relationship" and communicates by phone and letter. He has two grandchildren with whom he communicates by letter. Two of his brothers and a life-long friend confirmed to a correctional officer that Batie could live with them if released. Batie has contacted agencies that provide assistance with employment and housing; and he planned to obtain ongoing support through local self-help groups, AA, NA, and community agencies. He submitted a letter of support from a landscaping company offering him employment. A correctional officer opined that Batie had "[s]olid housing and employment assistance," which enhanced his chances of successful parole.

The 2009 Parole Grant by the Board

At the parole hearing in February 2009, the Board concluded that Batie was suitable for a grant of parole. The Board noted that Batie had not had a serious disciplinary violation since 1994 (for 15 years) and that he had numerous positive reports, including from his NA sponsor, work supervisor, and Muslim chaplain. The Board stated

that it had given "deep . . . and thorough consideration" to the commitment offense, and that although there were some discrepancies in Batie's version of the facts, they were "in no way, shape, or form beyond the confines of reasonableness"; the discrepancies were not "of any concern to [the Board] at all"; and Batie's version of the events was "in very close proximity" to what the Board found the actual facts were. The Board stated that Batie "took responsibility for taking the man's life" and demonstrated a "deep" level of remorse. The Board commented that Batie had "graciously handled" the Governor's previous reversals of his parole grants, which spoke highly of his ability to absorb difficulties. The Board stated that it was clear that Batie's "work on himself" was "true and deep." The Board considered Batie's prior crimes and violent acts; observed that they were all "some time ago"; and commented that the one higher rating in the psychological assessment tests was mainly a result of his prior history.

The Board assessed that Batie "got [him]self into a situation that [he] allowed to spin out of control and a man lost his life as a result of that." The Board found that Batie's maturation and growth over time showed he would not be a danger to society. In reaching this conclusion, the Board underscored that its members had extensive law enforcement backgrounds and they were convinced Batie would not be a danger to the community.

The Board conditioned the parole grant on Batie's participation in a substance abuse program and alcohol and drug testing.

The Governor's Reversal

On July 3, 2009, the Governor reversed the Board's parole grant. The Governor reviewed the positive factors in Batie's case, including his occupational training and employment, participation in self-help and therapy programs, positive reports from correctional and mental health professionals, and maintenance of close relationships with family and friends. However, the Governor concluded he should not be granted parole. The Governor stated there was evidence his crime involved "some level of premeditation" in that he had multiple opportunities to avoid it and cool off after the initial fist fight. Further, he lacked "full insight" into the circumstances of the offense and minimized his role in the crime. The Governor cited Batie's claims that he wanted to scare the victim; he did not intend to shoot anyone; and the shooting occurred when the victim grabbed him and threatened him with the knife and he panicked and shot the victim.

The Governor found that Batie's "version of events is wholly inconsistent with the facts contained in the record." The Governor cited the probation officer's conclusion that the claim of self-defense was self-serving, and the court of appeal opinion stating that Simmons was unarmed, made no movement toward Batie, and was standing 15 to 25 feet away when shot. Further, Batie returned to the scene twice, with two different weapons, and said he would "get" Simmons, and a witness saw Batie approach Simmons, make a comment, pull out a gun, point the gun at Simmons, and fire. The Governor concluded: "[Batie's] continued insistence that he did not intend to harm anyone indicates that he does not fully understand the circumstances of the crime and does not fully accept

responsibility for his role in Simmons's death. This is concerning because [Batie] cannot ensure that he will not commit similar crimes in the future if he does not fully understand and accept responsibility for his prior criminal conduct."

Additionally, the Governor cited the 2007 empirical test results. The Governor noted that Batie rated in the high range for historical factors that predict future violence, in the medium range for general recidivism, and in the low-moderate to low range for overall propensity for violence. The Governor concluded: "The fact that [Batie] received multiple elevated risk assessments . . . indicates to me that he still poses an unreasonable risk of recidivism if released at this time."

DISCUSSION

A. The Parole Suitability Framework

This court recognized in *In Re Vasquez* (2009) 170 Cal.App.4th 370 (*Vasquez*), that "[t]he granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities [(citations), and that] the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration . . . ' [citation]" (*id.* at pp. 379-380). Once the Board does set such a date, the California Constitution empowers the Governor to review the parole decision of an inmate who has been convicted of murder and sentenced to an indeterminate prison term. (Cal. Const., art. V, § 8, subd. (b).)

The decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655) that is guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the Board rests on the same factors that guide the Board's decision (Cal Const., art. V, § 8, subd. (b)), and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz, supra*, at pp. 660-661.)

In making the suitability determination, the Board and the Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, § 2402), such as the nature of the commitment offense including behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner;[6] (2) possesses a previous record of

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6 Factors that support the finding the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an

violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (§ 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and " 'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board or Governor].' " (*Rosenkrantz, supra,* 29 Cal.4th at p. 654; § 2402, subds. (c), (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz, supra,* at p. 655.) Because parole unsuitability

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exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

factors need only be found by a preponderance of the evidence, the Board or Governor is free to consider facts apart from those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.) Nonetheless, the Governor's decision, like the Board's decision, must comport with due process. (*Id.* at p. 660.)

B. Judicial Review

In *Rosenkrantz,* the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* further held that the same standards of review are applicable when a court reviews a Governor's decision reversing the Board. (*Id*. at pp. 658-667.)

In conducting this independent review of the Governor's decision, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra,* 29 Cal.4th 616, 677.) Although a court must ensure that the Governor considered the same factors the Board considered, "the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*Ibid*.)

In *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), our Supreme Court reaffirmed its analysis in *Rosenkrantz, supra,* 29 Cal.4th 616, that the Governor's decision of parole suitability is subject to the "some evidence" standard of review. (*Lawrence, supra,* at p. 1205.) However, in doing so it recognized that *Rosenkrantz's* characterization of that standard as extremely deferential and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra,* at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra,* at p. 1206.) The court in *Lawrence,* recognizing that the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*id*. at p. 1205), clarified that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id*. at p. 1212.)

As to this standard, the court in *Lawrence* further explained that although it was "unquestionably deferential, [it was] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*--the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210, italics added.) Because consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole (Pen. Code, § 3041, subd. (b); *Lawrence, supra*, at p. 1205), "[t]his inquiry is, by

necessity and by statutory mandate, an individualized one," and requires a court to consider the circumstances surrounding the commitment offense, along with the other facts in the record, to determine whether an inmate poses a current danger to public safety. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254-1255 (*Shaputis*).)

Regarding such consideration, "although the Board and Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.)

In this case, because the superior court below denied Batie's petition for a writ of habeas corpus, the current petition for habeas relief is an original proceeding that requires we independently review the record to determine whether there is some evidence to support the Governor's decision in reversing the Board's grant of parole for Batie. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) In other words, "we independently review the record [citation] to determine 'whether the identified facts [by the Governor] are probative to the central issue of current dangerousness when considered in light of the full record before [him].' [Citation.]" (*Vasquez*, *supra*, 170 Cal.App.4th at pp. 382-383.)

C. Analysis

On March 9, 2010, this court denied Batie's petition for writ of habeas corpus following the Governor's reversal of Batie's 2007 grant of parole. The current petition relates to the Governor's reversal of the 2009 action by the Board again granting parole. The record demonstrates that the Board's action in 2009 was based on the same 2007 psychological evaluation by Dr. Starrett as was used in the 2007 action by the Board. In short, there are no new facts relating to Batie's suitability for parole from the 2009 decision that were not before the Board and Governor in the 2007 action, save for the passage of time. Batie's explanations of the offense in 2007 and 2009 are largely the same. The Board's reasons for granting parole are largely the same, as are the reasons cited by the Governor for reversing the Board's decision.

In the discussion that follows, we continue to adhere to the views expressed by the same majority of the court on the same facts in March 2010. Because nothing has changed that would cause us to find our 2010 analysis of the record was in error, we will again find there was "some evidence" to support the Governor's decision to reverse the Board's 2009 grant of parole.

Although we are mindful that the aggravated nature of the life crime is not sufficient in and of itself to justify a decision denying parole unless, when considered in light of the other facts in the record, it is probative in showing that the inmate is currently dangerous (*Shaputis, supra*, 44 Cal.4th at pp. 1254-1255). We find that in this case the record shows Batie's commitment offense combined with his attitude about that crime and his failure to take full responsibility for it are probative that he is a continuing threat

to public safety and provide "some evidence" in support of the Governor's reversal decision.

With regard to the commitment offense, which the Governor found to be "especially heinous," such finding was based on some evidence in the record that suggested the killing was premeditated and supportive of first degree murder. Our appellate decision stated that between five and 30 minutes had passed from the time Batie and Simmons first argued and Batie shot him, giving Batie time to cool off, but instead he left and returned twice to challenge Simmons, each time with a different weapon; first with a tire iron and then with the gun hidden under his clothing. When he returned the second time with the gun he had retrieved from a place behind the liquor store, Batie had called out to Simmons who was sitting unarmed 15 to 25 feet away and had made no movement toward him before shooting Simmons twice as he stood up. Certainly these circumstances of the commitment offense are despicable, went beyond the basic elements for second degree murder, and fully justify Batie's conviction and sentence for that offense. However, as noted earlier, such reason would only provide "some evidence" to support the Governor's ultimate conclusion and reversal of the parole grant here if there were other facts in the record to provide a "rational nexus" for concluding Batie's offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at pp. 1210, 1213, 1221.) In this case, we believe the Governor's related reason based on his concerns about the genuineness of Batie's acceptance of responsibility and expressions of remorse provides that rational nexus.

The Governor found that Batie's continued insistence that he did not intend to harm anyone indicates he does not fully accept responsibility for the crime. As Batie specifically continued to claim he only shot Simmons because he panicked when Simmons came toward him with a knife, grabbed him and threatened him even though the evidence at trial showed Simmons did not advance on Batie or have a knife at the time Batie returned with the gun, the Governor could have reasonably found that Batie had not yet accepted full responsibility for the killing and was minimizing his culpability for the offense.

Because an inmate's acceptance of responsibility and signs of remorse may be considered in determining the inmate's suitability for parole (§ 2402, subd. (d)(3); *Shaputis*, *supra*, 44 Cal.4th at p. 1246),[7] to the extent these factors show an inmate lacks insight into and understanding of the behavior precipitating the commitment offense, they also can support a conclusion the inmate is currently dangerous and unsuitable for parole. (*Shaputis*, *supra*, at p. 1260.)

In *Shaputis*, the Supreme Court considered the inmate's claim there that the killing was accidental, even though he admitted his conduct was wrong and that he felt remorse for the crime, as some evidence of the inmate's unsuitability for parole because it showed he had failed to gain insight or understanding into either his violent conduct or his

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7 We recognize an inmate cannot be required to discuss the circumstances of the commitment offense or to admit guilt in order to be found suitable for parole. (Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236.) However, if an inmate, as here, chooses to discuss the circumstances of the commitment offense, or his or her responsibility and remorse for an offense, the Governor may consider the inmate's remarks to the extent they are relevant to the inmate's parole suitability. (§ 2402, subd. (b).)

commission of the commitment offense. (*Shaputis, supra,* 44 Cal.4th at p. 1260.) As established in *Shaputis,* "where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration." (*Lawrence, supra,* 44 Cal.4th at p. 1228.) Such is the case here.

Although expressions of insight and remorse will vary from inmate to inmate and there are no special words for an inmate to articulate in order to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior (*Shaputis, supra,* 44 Cal.4th at p. 1260, fn. 18), Batie's attitude about the commitment offense, claiming that he did not intend to shoot Simmons or kill him, is in sharp contrast to an inmate who has "consistently, repeatedly, and articulately . . . expressed deep remorse for [his] crime." (*Lawrence, supra,* 44 Cal.4th at p. 1222.) Batie's articulated acceptances of responsibility and expressions of remorse were that he knew he could have stopped and prevented the crime. He knew he had taken Simmons's life and Simmons did not deserve to die. He thought about the loss of Simmons's life daily, and he was extremely sorry. These various remarks, even if sincere, are largely undercut by Batie's continual assertions he did not intend to shoot or kill Simmons, he only intended to scare Simmons and his friend, and he only fired the gun when he panicked to protect himself. Although the Board apparently found that Batie's remarks concerning remorse showed he took full responsibility for killing Simmons even though his version of the facts did not comport

with his reported level of participation in the killing set out in our appellate opinion, the Governor does not have to accept the Board's finding on such matter. (See *Rosenkrantz, supra*, 29 Cal.4th at p. 667.) The Governor's independent assessment that these same facts suggested that the killing was premeditated and not unintentional or an accident as Batie still claims is a reasonable interpretation of the evidence and is not arbitrary or capricious. Moreover, they provide some evidence that Batie lacks insight into and understanding of the behavior that led to Simmons's death. Thus, Batie's insistence that the murder of Simmons was an unintentional incident caused by Simmons coming after him is further evidence of Batie's unsuitability for parole.

Even though Batie has taken great strides to enhance his ability to function within the law upon release from prison by participating in educational, vocational and self-help programs and has maintained strong familial relationships and friendships, Batie's multiple elevated risk assessments further support the Governor's decision reversing the Board. Although these test results are derived from Batie's criminal history, which included numerous theft offenses and several violent acts when he was a juvenile, and which was admittedly over 29 years ago, the Governor could properly consider that history of misconduct as additional support in finding that Batie had demonstrated difficulty in conforming his behavior to society's rules, which could affect his risk of failure on parole. (See *In re Reed* (2009) 171 Cal.App.4th 1071, 1082.)

Moreover, even though only one of Batie's multiple prison disciplinary actions involved violent behavior, many of them, including his most recent disciplinary action in 1997 for disobeying orders, facially indicate Batie's inability or unwillingness to live

within the rules. Analogous behavior of not being able to follow society's rules led to the commitment offense and Batie's other numerous crimes as a juvenile and young adult. Although the most recent disciplinary violation was 12 years before the current Board hearing, Batie's reply to the Board's question as to one of his earlier disciplinary violations provides another indication of his minimizing his responsibilities. Specifically, in response to a question about the 1984 finding by the prison authorities that Batie had been in possession of instructions on how to manufacture PCP, Batie said he only accepted responsibility for the charge because the plans belonged to his roommate and were found in their cell. The Governor could rationally draw the inference that Batie's answer was an additional example of his failure to take responsibility for his actions, similar to his minimizing his role in Simmons's murder.

Because Batie has not accepted his role in the commitment offense and in at least one disciplinary violation, rather appearing to currently externalize his involvement, the Governor could properly find that Batie continues to lack insight as to his wrongful actions. Thus, the egregious nature of his life offense, coupled with his elevated risk assessments, and his lack of awareness into his life offense and other wrongful actions, tends to show Batie has not committed to ending his previous pattern of antisocial behavior and, therefore, provides some evidence and a rational nexus to support the Governor's conclusion Batie is currently dangerous and his release would pose an unreasonable public safety risk. (*Shaputis, supra,* 44 Cal.4th at p. 1260; *Lawrence, supra,* 44 Cal.4th at p. 1228.)

Contrary to Batie's contention that the Governor failed to give him individualized consideration, the record belies such an assertion. That the Governor may not have given the same weight to favorable factors as the Board did or that Batie would have given to them does not show a lack of individualized consideration. There is no requirement that the Governor give greater weight to factors favoring a prisoner's release, or even agree with favorable evidence. Nor is it for this court to reweigh the evidence provided there is some evidence, as we have found, to support the Governor's determination that the inmate poses an unreasonable risk of current danger. (*Shaputis, supra,* 44 Cal.4th at pp. 1258, 1260-1261.)

We also reject the claim that there is no nexus between the factors relied upon by the Governor and Batie's current threat to public safety. Although the Governor did not specifically state that there was a "rational nexus" between any factor and his ultimate conclusion, the some evidence standard only "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those facts and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1210.) Here, the Governor gave more than a mere "rote recitation" of the parole unsuitability factors, providing a two and one-half page statement of reasons explaining the basis of his reversal of the Board's decision. As noted above, such reasoning provides a rational nexus to the Governor's decision. The court in *Lawrence* held that such nexus exists where an inmate, as in this case, lacks insight or remorse into a particularly aggravated murder offense. (*Id.* at p.

1228.) No additional pro forma recitation on the record is required where the reasoning, as here, sufficiently provides the rational nexus. (*Id*. at p. 1210.)

Before we conclude our analysis of the evidence supporting the Governor's decision, we must make a brief comment on our dissenting colleague's view of the facts.

Undoubtedly, there is some evidence to support the Board's decision to grant parole. That is not the test we must apply. We must decide if there is some evidence, based on the Governor's reasonable evaluation of the facts, to support the Governor's decision. The dissent errs, in our opinion, in the analysis that Batie's self-serving version of the facts is not impossible. While anything is possible, again that is not the question.

Batie's version is wholly inconsistent with the decision of the jury, the comments of the trial judge and the probation officer's report.

If Batie's version is accurate, he should not have been convicted of second degree murder. His story is one of self-defense or imperfect self-defense leading to a conviction of involuntary manslaughter at most. Surely the Governor was entitled to believe the facts as demonstrated by the evidence and verdict. Therefore, while the dissent's version of "possible facts" would support a decision to grant parole, it does not provide a basis for undermining the Governor's decision.

As for Batie's ex post facto claim, it has been resolved against him by our Supreme Court in *Rosenkrantz, supra*, 29 Cal.4th 616, 636-640, and we are bound by such decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

We further reject Batie's additional contentions challenging the Governor's parole policy and claiming cruel and/or unusual punishment. The statistics submitted by his

counsel do not overcome the presumption that the Governor has regularly performed his official duty. (See *Rosenkrantz*, *supra*, 29 Cal.4th at pp. 683-684.) The latter assertion is meritless because Batie has not alleged that his sentence is disproportionate to his offense. Nor, in light of the holding in *Lockyer v. Andrade* (2003) 538 U.S. 63, where the United States held that two consecutive 25-year-to-life terms in prison for two counts of petty theft under California's Three Strikes Law was not grossly disproportionate to the offenses, do we believe Batie would be able to show that his indeterminate life term with the possibility of parole for the more serious offense of second degree murder constitutes a term grossly disproportionate to his offense.

DISPOSITION

The petition for writ of habeas corpus is denied.

HUFFMAN, Acting P. J.

I CONCUR:

IRION, J.

HALLER, J.

I dissent.

I disagree that there is some evidence to support the Governor's reversal of parole. The record does not support the Governor's finding that Batie lacked full insight into the circumstances of the commitment offense, a finding necessary to provide a nexus to make the facts of the commitment offense relevant to current dangerousness. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1261, fn. 20.) In my view, to determine whether the record can support a lack of insight finding, it is necessary to evaluate both the prosecution's *and Batie*'s version of the commitment offense. Although the majority states its recognition of this principle as set forth in *In re Palermo* (2009) 171 Cal.App.4th 1096, we disagree on its application to the record presented here.

In *In re Shaputis, supra*, 44 Cal.4th at page 1246, the California Supreme Court recognized that parole may properly be denied if the defendant denies or minimizes his or her culpability so as to reflect a failure to take responsibility or lack of insight about his or her behavior. However, this principle must also be considered in light of Penal Code section 5011, under which parole denial may not be based merely on the defendant's refusal to admit guilt of the commitment offense (Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236; *In re Palermo, supra,* 171 Cal.App.4th at p. 1110; *In re McDonald* (2010) 189 Cal.App.4th 1008, 1018; *In re Twinn* (2010) 190 Cal.App.4th 447, 466.)[1]

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1 Subsequent unspecified statutory references are to the Penal Code. Section 5011, subdivision (b) states: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed."

In *Palermo, supra,* 171 Cal.App.4th at pages 1110-1112, the court interpreted section 5011 to mean that parole cannot be denied on the basis of lack of insight concerning the commitment offense based on the defendant's failure to adopt the prosecution's version of the offense if the defendant's version is not necessarily inconsistent with the evidence, is not physically impossible, and does not strain credulity. In *Palermo*, the court concluded the record could support the defendant's claim that he committed an accidental shooting (supporting manslaughter), and that a standard requiring him to adopt the prosecution's version would improperly equate with requiring him to admit the commitment offense of murder. (*Id*. at pp. 1110-1111.)

Under *Palermo*, the tension between section 5011 and the lack of insight principle can be resolved by evaluating whether the defendant's statements reflecting a lesser level of culpability (i.e., minimization) are a plausible interpretation of the evidence. In cases where the defendant reasonably might have a lesser culpability than shown by the commitment offense, the defendant's failure to fully admit the commitment offense does not reflect current dangerousness. In this circumstance, the defendant's reasonable claims of lesser culpability do not point to any lack of understanding indicative of dangerousness if released. (See, e.g., *People v. Palermo, supra,* 171 Cal.App.4th at pp. 1100, 1112 [lack of insight finding based on defendant's insistence that shooting was accidental; finding not supported in case where defendant's claim that he thought he had emptied bullets

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California Code of Regulations, title 15, section 2236 states in relevant part: "The board shall not require an admission of guilt to any crime for which the prisoner was committed. . . ."

from gun when he "foolishly" fired at his girlfriend while playing "'cowboy'" was "not physically impossible and did not strain credulity"]; *In re Twinn, supra*, 190 Cal.App.4th at p. 468 [lack of insight finding based on defendant's claim of no intent to kill; finding not supported in case where victim died both from defendant's beating and preexisting heart disease]; *In re McDonald, supra,* 189 Cal.App.4th at pp. 1017, 1023 [lack of insight finding based on defendant's claim he did not participate in murder; finding not supported in case where defendant was convicted based primarily on testimony of members of secret society implicated in murder].)

In contrast, where it is patently implausible that the defendant has a lesser culpability than the commitment offense, the defendant's failure to fully admit the commitment offense may be indicative of current dangerousness based on lack of insight. In this circumstance, the defendant's unreasonable claim of a lesser culpability shows he does not fully understand his behavior, which supports that he still poses an unreasonable risk of repeating the behavior. (See, e.g., *In re Shaputis, supra,* 44 Cal.4th at pp. 1246-1250, 1260 [lack of insight finding based on defendant's insistence that shooting of wife was unintentional; finding supported in case where defendant had long history of domestic violence and had shot at wife several months before the murder]; *In re Rozzo* (2009) 172 Cal.App.4th 40, 60-63 [lack of insight finding based on defendant's denial of participation in murder and of racial animus; finding supported in case where defendant acknowledged participating in kidnapping and beating of victim while making racial slur]; *In re Smith* (2009) 171 Cal.App.4th 1631, 1633-1635, 1638-1639 [lack of insight finding based on defendant's denial of participation in fatal beating of daughter; finding

supported in case where victim's sister testified defendant participated in beating]; *In re Taplett* (2010) 188 Cal.App.4th 440, 443, 449-450 [lack of insight finding based on defendant's claim that she did not think codefendant intended to kill victim in drive-by shooting; finding supported in case where codefendant stated she wanted to " 'bust a cap' " on victim and (while defendant was driving) codefendant had earlier shot at victim's vehicle].)

Here, the record before us does not support that Batie's version of the offense is necessarily inconsistent with the evidence. According to Batie, Simmons and Love were hassling him for money, and Simmons was drunk and bullying him. During the fight, Batie became angry when Love or Simmons took some money that fell from Batie's shirt pocket and refused to give it back. The men were throwing beer bottles at each other. Simmons hit Batie in the head with a beer bottle and inflicted a severe cut on his hand and wrist.[2] Simmons stated he was "going to do something" to Batie and Batie better not come back over there. When he returned to the scene with a tire iron, Simmons had armed himself with a crowbar and a knife. Batie thought the knife might have been a fishing knife that Love kept in the glove compartment of his car. Batie and Simmons "stood in the street yelling at each other, and it was basically a standoff." Simmons told Batie he was going to stab and kill him. Batie retrieved a gun that was stashed behind the store, and brought it back to the scene with the intention of pistol whipping Love or

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[2] Corroborating Batie's claim that he was cut, the probation report states that at the time of Batie's arrest he had lacerations on his wrist and right hand which required stitches.

Simmons to get them to turn over his money. He was thinking, " 'If I scare the dude, I'll get my money back.' " Batie first confronted Love, telling him to give him back his money. Batie's gun was not in view. Simmons then stood up, saying "I told you not to come by here." Simmons was walking towards Batie, and Batie told him to stay back. Simmons grabbed Batie and lunged at him with a knife. As Batie was backing up, he pulled out the gun and shot Simmons at a distance of about three to five feet because he thought Simmons was going to stab him. Batie claimed that when he returned with the gun he did not intend to kill but merely to frighten, and when Simmons came towards him with a knife he panicked and fired the gun.

The record cannot support a finding that Batie's version is impossible or patently implausible. Our appellate court opinion affirming Batie's conviction states that Simmons was unarmed and did not advance towards Batie; that Batie shot at a distance of 15 to 25 feet; and that the police did not find a weapon at the scene. However, our opinion did not summarize Batie's testimony describing his version of the facts as they were not relevant to the issues on appeal. The facts set forth in the appellate opinion and in the probation report do not foreclose the plausibility of Batie's version of the facts. The confrontation occurred at night by a liquor store when the parties had been drinking.[3] It is undisputed that Simmons participated in a fight with Batie, including throwing a beer bottle at him and cutting him enough to require stitches. The fact that

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[3] The coroner's report indicated Simmons had a blood alcohol level of .06 percent. Batie stated he was drinking beer before the offense, and he had used cocaine the night before the shooting.

Simmons had aggressed towards Batie during the initial confrontation can support that he continued acting aggressively when Batie returned with the gun hidden in his clothing. The nighttime hour and the milieu of a liquor store parking lot with parked cars raises the reasonable possibility that there were visual obstructions that prevented witnesses from definitively calculating the distance or seeing everything that transpired between the two men in the seconds before the shooting. The failure to find a knife at the scene can be explained by a number of possibilities, including the difficulty of searching at night or the removal of the knife before the police arrived.

Likewise, the record does not preclude that Batie did not have the intent to kill Simmons when he returned with the gun. As noted by the probation officer, Batie "return[ed] with what intention we are not sure of. He may or may not have intended to kill the victim, only he knows." Although there was evidence supporting premeditation when Batie returned to the scene with the gun, this finding was not compelled by the record; indeed, the jury's second degree murder verdict reflects that the jury credited Batie's denial of planning to shoot the victim. In short, because the record does not foreclose the plausibility of Batie's claim that he shot in a panic reaction, a parole denial cannot be conditioned on his failure to accept the prosecution's version of the commitment offense.

At the 2009 Board hearing Batie acknowledged that he took Simmons's life, Simmons did not deserve to die, and he (Batie) could have stopped his behavior but chose to continue. After 28 years of incarceration, Batie's statements at the 2009 hearing show that he understands that by returning to the scene with a gun he escalated the conflict and

placed himself in a position that caused him to wrongfully take a man's life. Further, notwithstanding his claim that he shot in a panic reaction, Batie does not dispute that he willfully fired the gun. Recognizing he cannot legitimately claim self-defense when he created the circumstances giving rise to the death, Batie also does not dispute that he was properly convicted of second degree murder.[4]

The Governor's lack of insight finding is predicated on Batie's failure to adopt the details of the prosecution's version. Because the record cannot reasonably support a conclusion that Batie's version is necessarily inconsistent with the evidence, Batie's adherence to his version cannot be characterized as a lack of insight supporting a denial of parole.

I also conclude there is no evidence to support the Governor's finding that the parole grant should be reversed because Batie received "multiple elevated risk assessments." Dr. Richard Starrett's report indicates that these scores resulted from historical, unchangeable factors occurring several decades earlier, including Batie's juvenile violence, his substance abuse history, and his criminal history. The Governor's finding fails to take into consideration Dr. Starrett's lengthy cautionary statement that some people cannot receive a low range score because of static, immutable factors in their history no matter how much they may have changed, and that other sources of

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4 The second degree murder verdict did not require intent to kill, but could be based on a deliberate act with conscious disregard for life. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102-104.) Further, a claim of self-defense is ordinarily not available when the defendant sought out the deadly quarrel. (See *People v. Hecker* (1895) 109 Cal. 451, 462; *Fraguglia v. Sala* (1936) 17 Cal.App.2d 738, 743.)

information must be considered when determining violence potential. On the HCR-20 test, in addition to the high score for the historical component, Batie received two low scores, in the clinical/insight and risk management components. Overall, Dr. Starrett measured Batie's risk of future violence under the HCR-20 test as in the low-moderate to low range. The Governor's decision cites this overall conclusion, but rather than giving it any consideration focuses on the elevated scores with no recognition that the latter were based on immutable factors.

All the evidence in the record reflects that Batie has changed dramatically since the time of the commitment offense. In 2009 when the Board granted parole, he was 53 years old; he had received therapy and been active in NA and other self-help programs for numerous years; and he has not had any significant or even minor disciplinary violations for 12 years. His single and last disciplinary violation involving violence occurred in 1987, 22 years earlier. Psychologists who evaluated him in 2001, 2004, 2006, and 2007 concluded that he had shown remorse, empathy, responsibility, and insight concerning his crime, and a commitment to maintaining a sober lifestyle.

There must be some evidence to support the Governor's *decision* of current dangerousness, not merely some evidence to support a factual finding. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) The current dangerousness determination mandates a "consideration of the passage of time [and] the attendant changes in the inmate's psychological or mental attitude." (*Shaputis, supra*, 44 Cal.4th at p. 1255.) To satisfy the "some evidence" test, the Governor's interpretation of the evidence must be reasonable (*id.* at p. 1258), and the evidence supporting the decision must carry some

indicia of reliability (*In re Moses* (2010) 182 Cal.App.4th 1279, 1300). Given the overall psychological test result showing that Batie presents a low-moderate to low risk of future violence, his 22 years of violence-free behavior, and the uncontradicted evidence that he has developed an understanding of his prior criminality and remedied its causes, the Governor's current dangerousness finding based on the extraction of elevated test results derived from static factors is not a reasonable interpretation of the evidence.

Because the record fails to show some evidence to support the Governor's finding of current dangerousness, I would grant Batie's request for relief.

HALLER, J.